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No. 84-808

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA, ET AL., PETITIONERS

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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QUESTION PRESENTED

Whether Section 7(a)(1) of the Endangered Species Act, 16 U.S.C. 1536(a)(1), authorizes the Secretary of the Interior to utilize Stampede Dam on the Little Truckee River to conserve endangered and threatened species of fish in Pyramid Lake.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 741 F.2d 257. The October 4, 1982 opinion of the district court (Pet. App. 37a-54a) is reported at 549 F. Supp. 704, and the February 16, 1982 opinion of the district court (Pet. App. 23a-36a) is reported at 537 F. Supp. 106. The district court's opinion of August 27, 1979 (Pet. App. 11a-22a) is unreported.

JURISDICTION

The decision of the court of appeals was rendered on August 22, 1984 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a dispute over the current operation by the Secretary of the Interior of the Stampede Dam and Reservoir. The Stampede Dam is located on the Little Truckee River in California. The Little Truckee flows into the Truckee River and is part of the Truckee River basin, which occupies approximately 2,730 square miles in California and Nevada. The Truckee River, upon leaving Lake Tahoe, flows in a northerly direction, where it is fed by the tributary inflow of Donner Creek, Martis Creek, Prosser Creek, and the Little Truckee River before entering the Truckee Meadows area. A large portion of the river flow is diverted for municipal, industrial and domestic uses and irrigation in the Truckee Meadows area. After leaving the Truckee Meadows, the River proceeds, with minor inflows and diversions,[1] to the Derby Diversion Dam, where approximately 40% of the mean annual flow is diverted into the Truckee Canal for eventual distribution to the Newlands Reclamation Project. Water not diverted at Derby Dam then passes through Marble Bluff Dam[2] to its terminus, Pyramid Lake. The Truckee River is the only permanent stream flowing into the Pyramid Lake basin, and the water level of Pyramid Lake is almost entirely dependent upon Truckee River inflow to counterbalance evaporation and see page. R. 289A.

Historically, Pyramid Lake was one of the premier fisheries in North America. See *Nevada* v. *United States*, 463 U.S. 110 (1983). It supplied enormous quantities of both Lahontan cutthroat trout and cui-ui to generations of Indians and served as a mainstay not only for the Pyramid Lake

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[1]Before leaving Truckee Meadows, the remaining Truckee River flow is increased by agricultural return flows, effluent from the Reno-Sparks Joint Water Pollution Control Plant, and intermittent inflows from Washoe Lake via Steamboat Creek.

[2]Marble Bluff Dam is a structure for fishery enhancement and control of upstream channel and bank erosion.

Indians but also for other tribes in western Nevada. However, since this very productive period, upstream diversions and drought conditions have altered the Lake dramatically. This decline was described as follows by the Ninth Circuit in *United States* v. *Truckee-Carson Irrigation District*, 649 F.2d 1286, 1292 (1981), as amended, 666 F.2d 351 (9th Cir. 1982), aff'd in part and rev'd in part by this Court in *Nevada* v. *United States*, 463 U.S. 110 (1983):

> Pyramid Lake's fishery continued to be productive through the first part of the century. Around the time of the Orr Ditch evidentiary hearing [1919-1921], however, the [Newlands Reclamation] Project's diversion of "almost the whole volume of the Truckee River" into another watershed, began to tell. The level of the lake began to drop. This, in combination with refuse from upstream sawmills, built up a delta at the mouth of the Truckee River. In 1921 Lorenzo Creel, a Special Supervisor in the Indian Service, had to arrange a special spill of water from Derby Dam to enable the Lake's trout to pass the delta. Without the additional water, the fish were unable to reach their upstream spawning grounds.

As a result of these conditions, the cui-ui and the Lahontan cutthroat trout that once abounded in the Lake and River are now classified under the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, as an "endangered species" and "threatened species," respectively.[3] The cui-ui is a member

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[3]The Act defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. 1532(6). A threatened speices is defined as any ~~speices~~ species "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(20). The Lahontan cutthroat trout was originally listed as an endangered species (35 Fed. Reg. 16047 (1970)), but it is now listed as threatened. 40 Fed. Reg. 29863 (1975).

of the sucker family. There are presently three surviving species within the genus (Chasmistes), but the cui-ui is the only species that remains in pure form. The cui-ui were able to avoid extinction by reproducing in areas of small fresh water inflow. The present number of cui-ui in Pyramid Lake is but a small percentage of the historical population. R. 296.

The Lahontan cutthroat trout is a member of the salmon and trout family (Salmonidae). The Lahontan trout is currently found throughout its native range (east-central California and northern Nevada) and outside of its native range in several small streams. However, the number and size of the populations and their habitats all are degraded from those that previously existed. By 1940 the trout had disappeared from the Lake but were saved from extinction by the transplantation of eggs to other similar environments. The current population of the trout is but a small percentage of the numbers that inhabited Pyramid Lake at the turn of the century.

2. The Stampede Dam and Reservoir are part of the Washoe Reclamation Project authorized by the Washoe Project Act of 1956. 43 U.S.C. (1970 ed.) 614-614d, reproduced at Pet. App. 145a-149a. Congress authorized the project for flood control, irrigation, drainage, storage, power generation, development of fish and wildlife, and other beneficial purposes. 43 U.S.C. (1970 ed.) 614. The Act does not expressly provide for operation of the Project for municipal and industrial water supply (M&I) purposes. Congress contemplated when it authorized the Project that most of the construction costs would be reimbursed through the irrigation, drainage, and hydroelectric aspects of the Project,[4] but the Act did not require the Secretary to enter

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[4]See H.R. Rep. 2055, 84th Cong., 2d Sess. 3, 7, 13, 16, 17 (1956); S. Rep. 1869, 84th Cong., 2d Sess. 9, 11, 17-18 (1956).

into repayment contracts as a prerequisite to construction of the dam. See 43 U.S.C. (1970 ed.) 614a.

In 1966, citing the immediate need for flood control for the protection of Boca Dam and the Reno-Sparks area, the Secretary ordered construction of Stampede Dam to begin even though reimbursement contracts had not been executed (Pet. App. 26a). In 1967, the Secretary declared the cui-ui to be an endangered species, 32 Fed. Reg. 4001 (1967), and he subsequently gave a similar designation to the Lahontan cutthroat trout, 35 Fed. Reg. 16047 (1970).

In 1969, one year prior to the completion of the dam, the Secretary announced that it would not be used for M & I purposes, as previously had been anticipated.[5] Instead, the Secretary directed that until competing water right claims on the Truckee and Carson River systems were resolved, the dam and reservoir would be used only for flood control, fish and wildlife benefits, and recreation. The dam was completed in 1970, and it has been operated since that time only for these purposes. Pet. App. 26a-27a.

3. Petitioners filed this action in the United States District Court for the District of Nevada in October 1976, seeking to compel the Secretary to sell water from Stampede Dam for M & I purposes. The Pyramid Lake Paiute Tribe was permitted to intervene. To facilitate resolution of the case, the district court divided it into two phases. In

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[5]In February 1965, prior to construction of Stampede Dam, the United States and petitioner Carson-Truckee Water Conservancy District entered into a contract under which the United States would deliver water in return for repayment of a substantial portion of the costs of the Project. That agreement provided, however, that it would not be effective until the parties agreed to a supplemental contract regarding allocation of repayment costs of Stampede Dam. Pet. App. 12a-13a. The requisite supplemental agreement has not been executed by the Secretary. Pet. App. 24a.

Phase I (Pet. App. 23a-36a), the court considered the various legal defenses raised by the Secretary and the Tribe. The court held that petitioners have standing to bring the action and have a right of action under the reclamation laws and the Administrative Procedure Act to seek judicial review of the Secretary's determination not to sell water at this time to obtain reimbursement for the cost of the Project (Pet. App. 28a-32a). The court also rejected the Tribe's contentions that the Secretary is not obligated to obtain reimbursement for the Project and is not authorized to sell water from Stampede for M & I uses (*id.* at 33a-35a), holding that the Secretary is "obligated to sell all of the Stampede waters not required to fulfill his obligations under the Endangered Species Act" (*id.* at 35a).[6]

In Phase II (Pet. App. 37a-54a), the district court held that the Secretary did not abuse his discretion in his operation of Stampede Dam. The court observed that petitioner "[did] not deny that the Secretary has obligations to the Tribe and under the Endangered Species Act which take precedence over his obligation to store water for municipal and industrial (M & I) use," but that petitioners contended that "there is sufficient water for M & I storage after the water requirements under the Endangered Species Act have been satisfied" (Pet. App. 42a). The court disagreed with the latter assertion.

The district court first rejected petitioners' argument that the Secretary's only obligation under the Endangered Species Act is that imposed under Section 7(a)(2), 16 U.S.C. 1536(a)(2), which requires each federal agency to insure that any action it authorizes, funds, or carries out is not likely "to jeopardize the continued existence of any endangered

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[6]The district court also rejected the argument by petitioner State of Nevada that the Secretary's current operation of the dam requires him to obtain a water permit from the State of Nevada (Pet. App. 35a-36a).

species" or result in the destruction of a "critical" habitat of such species. Petitioners argued that this provision permits the Secretary to utilize only that amount of water necessary to prevent the extinction of endangered species (Pet. App. 44a-45a). The court concluded, however, that other provisions of the Endangered Species Act impose obligations on the Secretary that go beyond merely refraining from causing extinction and impose an affirmative obligation on him to seek to "conserve" endangered species, which the Act defines as the use of all methods and procedures necessary to bring any endangered or threatened species to a point where the measures prescribed by the Act are no longer necessary. See Pet. App. 43a-46a, citing Sections 2(b)-(c) and 3(3) of the Act, 16 U.S.C. 1531(b)-(c) and 1532(3). The court found this interpretation of the Act to be supported by this Court's conclusions in *TVA* v. *Hill*, 437 U.S. 153 (1978), that "[t]he plain intent of Congress in enacting this statute was to halt and *reverse* the trend toward species extinction, whatever the cost," and that Congress has made "a conscious decision * * * to give endangered species priority over the 'primary missions' of federal agencies" (Pet. App. 45a, quoting 437 U.S. at 184-185 (emphasis supplied by the court of appeals)).

The district court also concluded that the Secretary's plan for operating Stampede to conserve the cui-ui and Lahontan cutthroat trout is supported by substantial evidence. The court found that large flows of water in the lower Truckee River are required during the spawning season for the cui-ui, which generally occurs from mid-March through June, because large flows: (1) attract the fish to the mouth of the fishway; (2) maintain the river water at a cooler temperature, which results in greater migration, hatching, and survival of larval cui-ui; and (3) prevent spawners and larval cui-ui from being stranded in the River and dying before they return to Pyramid Lake (Pet. App. 48a-49a).

Similarly, the court found that although the natural spawning grounds of the Lahontan cutthroat trout in the upper Truckee are now inaccessible by virtue of Derby Dam, large flows of cool water in the lower Truckee nevertheless are required during the spawning period to attract the spawners to the fishway, where they are captured for several trout hatcheries. On this basis, the court found that the timely release of substantial water flows from Stampede Dam during the spawning season is "essential" to the Secretary's fishery program (Pet. App. 48a).

By contrast, the court found that petitioners' alternative proposal to permit releases for M & I purposes would not meet even petitioners' own view of the requirements of the Endangered Species Act, because their proposal "would jeopardize the existence of the cui-ui and hasten their extinction" (Pet. App. 50a). Petitioners' alternative plan called for release of some water for M & I uses and provided for protection of the fish by planting shade trees along miles of the River to reduce the water temperature, confining the River to a single channel, and constructing hatcheries (*id.* at 9a). The court found, however, that this plan would provide for the release of water only in small quantities, principally outside the spawning season, and would reduce the average river flow during the spawning season, when large flows are necessary, to a level 20% below that which existed even before Stampede Dam was built — a time when the cui were practically extinct (*id.* at 50a). The court also found that water releases for the fishery in certain dry years might require all of the water from Stampede Dam, leaving none for M & I users. Against this background, the court determined that "it is not feasible to operate Stampede Dam for both M & I and fishery purposes" (*ibid.*). Accordingly, the district court entered judgment in favor of the Secretary, concluding that "his operation of Stampede for the benefit of the Pyramid Lake cui-ui fish and the Lahontan cutthroat

trout is reasonable and proper and does not constitute an abuse of discretion" (*id.* at 54a).

3. The court of appeals affirmed in part and vacated in part (Pet. App. 1a-10a). The court rejected petitioners' contention that the Secretary is authorized by the Endangered Species Act to take only those actions necessary to avoid "jeopardizing" the continued existence of an endangered or threatened species and does not authorize him to take affirmative measures in the operation of a project such as Stampede Dam to rehabilitate such a species (*id.* at 6a-8a). In the court's view, this reading of the Endangered Species Act "would lead to a result at odds with the statute's clearly stated objectives" (*id.* at 6a). Like the district court, the court of appeals read provisions of the Act other than Section 7(a)(2), upon which petitioners solely relied, to provide for the Secretary to "actively pursue a species conservation policy" (*id.* at 7a). Thus, the court held that the Endangered Species Act supports the Secretary's decision to operate Stampede Dam in such a manner as to give priority to conservation of the cui-ui and trout and not to sell project water for M & I uses at this time.

The court of appeals also sustained the district court's holding that the Secretary did not abuse his discretion in rejecting petitioners' alternative plan that would have provided for the operation of Stampede Dam for both M & I and fishery purposes. Because the court of appeals held that, under the Endangered Species Act, the Secretary is permitted at this time to use all of the project water to conserve the two species of fish, it concluded that it "need not resolve the extent of the Secretary's obligation to obtain reimbursement for the project in the future" (Pet. App. 5a). Accordingly, the court of appeals vacated the district court's decision insofar as it held that the Secretary is obligated to sell for M & I purposes any water that is not needed to fulfill his obligations under the Endangered Species Act (*ibid.*; see *id.* at 35a).

ARGUMENT

The decision of the court of appeals is correct and is supported by this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), and by the legislative history of subsequent amendments to the Endangererd Species Act. Nor is there any conflict with the decision of any other court of appeals. The courts below simply sustained the Secretary's exercise of his discretion in the particular circumstances presented to operate Stampede Dam in a manner that promotes the conservation of the cui-ui and Lahontan cutthroat trout. This case therefore presents no question concerning what measures, if any, a court may compel the Secretary to take in this regard where he has exercised his discretion in some other manner. Nor, contrary to petitioners' extravagant assertions, does the decision below impose rigid and radical new obligations on the Secretary or other federal officials, resolve questions regarding the operation of any reclamation projects other than Stampede Dam, or dispense with the repayment principle under the reclamation laws. What is more, both courts below concluded that petitioners' alternative plan for operation of Stampede Dam to make some water available for M & I purposes would not even satisfy petitioners' own view of the requirements of the Endangered Species Act, because it would jeopardize the continued existence of the cui-ui. Further review therefore is not warranted.

1. Petitioners contend (Pet. 8-13) that the Secretary's authority to implement the Endangered Species Act with respect to the Washoe Project is limited to taking only those measures that are necessary under Section 7(a)(2) of the Act to insure that the operation of the Project "is not likely to jeopardize the continued existence of any endangered or threatened species" (16 U.S.C. 1536(a)(2)). In petitioners' view, not only is the Secretary not required to do any more than this for the benefit of the endangered and threatened

species in Pyramid Lake; he is not even *permitted* to do so. Instead, they maintain, the Secretary is required to devote to M & I use all water stored by Stampede Dam that is not needed to prevent jeopardizing the fish.

Of course, even if petitioners were correct in their interpretation of the Act, it does not appear that any water could be made available for M & I use. The district court concluded that "it is not feasible to operate Stampede Dam for both M & I and fishery purposes" (Pet. App. 50a). The district court also found that petitioners' alternative plan for operating the Project in a way that would permit some releases for M & I consumption would violate Section 7(a)(2) because it "would jeopardize the existence of the cui-ui and hasten their extinction" (Pet. App. 50a). The court of appeals affirmed that holding (*id.* at 8a-10a), and petitioners do not challenge it here. Nor have they proposed any other plan that would insure that the cui-ui would not be jeopardized. In the absence of a concrete plan before the Court that meets even the minimum requirements of the Act, there is no ripe controversy regarding permissible alternatives for the operation of Stampede Dam, and it is questionable whether the broader issues petitioners seek to raise concerning the scope of the Secretary's discretion in implementing the Endangered Species Act are even properly before the Court.

Moreover, the Court should not attempt to resolve these questions in the abstract, without the benefit of a record concerning a proposal for operating Stampede Dam that does provide for releasing some water for M & I purposes and yet at least succeeds in insuring that the cui-ui will not be jeopardized. If the Secretary rejected such a proposal, the Court then would have the benefit of his reasons for doing so and supporting evidence. Nothing in the decision below forecloses petitioners from submitting such a proposal if they should develop one. If they do so and it is

rejected by the Secretary and the courts below, there will be time enough for this Court to consider these issues.[7]

2. a. In any event, petitioners' contention that the Secretary's authority under the Endangered Species Act is limited to insuring that his actions with respect to the Washoe Project are not likely to jeopardize the existence of an endangered species is refuted by the explicit language of a number of provisions of the Act and is directly contrary to its entire thrust. The "no jeopardy" requirement of Section 7(a)(2), upon which petitioners rely, represents the bare minimum that any federal agency must do to carry out its responsibilities under the Act. However, the immediately preceding provision, Section 7(a)(1), furnishes the Secretary and the heads of other agencies with additional authority: it provides for them to take affirmative measures to enhance the status of an endangered or threatened species. Section 7(a)(1), 16 U.S.C. 1536(a)(1), provides:

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[7]Petitioners apparently contend (Pet. 10 & n.3, 12) that the Secretary should pursue the consultation process provided for in Section 7(a)(2) of the Act in order to develop an alternative operating plan. However, Section 7(a)(2) requires consultation with the Secretary by a federal agency when the *agency* proposes to take action. In these circumstances, the consultation process serves to ensure that the actions the agency proposes will not jeopardize an endangered species, and it enables the Secretary to assess the potential impact of the action and, if necessary, to suggest "reasonable and prudent alternatives" that would not jeopardize the listed species and therefore not violate Section 7(a)(2). See § 7(b)(3), 16 U.S.C. 1536(b)(3). Here, the agency concerned — the Department of the Interior — has not proposed any "agency action" to modify the operation of Stampede Dam to provide for releases of water for M & I purposes, and the consultation requirement therefore has not been triggered. Moreover, even if private parties such as petitioners were authorized to trigger the consultation process simply by proposing to the agency concerned that it take "agency action," the only such proposal petitioners have suggested has already been found by the district court to be inadequate under Section 7(a)(2).

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

The purposes of the Act that are to be furthered by the Secretary are set forth in Section 2(b), 16 U.S.C. 1531(b):

> The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

Section 2(c)(1) of the Act, 16 U.S.C. 1531(c)(1), reiterates these principles:

> It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

The three sections of the Act just quoted use the key terms "conserve" and "conservation," which in turn are defined in Section 3(3) of the Act, 16 U.S.C. 1532(3):

> The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at

> which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Thus, it is clear that the concept of "conservation" under the Endangered Species Act goes beyond merely assuring that an endangered or threatened species does not become extinct. It contemplates affirmative "methods and procedures" in furtherance of the ultimate goal of bringing the species to the point at which the protections of the Act are no longer necessary — *i.e.*, to the point at which the species is no longer endangered or threatened. And Section 7(a)(1) expressly directs the Secretary to utilize "programs administered by him" — which includes the operation of Stampede Dam — in furtherance of this statutory purpose of "conservation." Indeed, Section 3(3) includes among an agency's "methods and procedures" for conservation that of "habitat * * * maintenance"; in his operation of Stampede Dam, the Secretary has sought to maintain a suitable habitat for the cui-ui and Lahontan cutthroat trout in the lower Truckee and at the mouth of the fishway during the spawning season. The plain language of the Act thus covers this very case. Accordingly, the court of appeals was clearly correct in holding (Pet. App. 8a) that the statutory provisions just cited support the Secretary's decision at this time to utilize water stored by Stampede Dam to conserve the fish and not to sell the water for M & I purposes that would detract from that effort.

b. Petitioners make no attempt to answer this analysis or to explain the significance of the various statutory provisions if they do not have the meaning we have just described. Petitioners simply ignore these provisions and discuss only the "no jeopardy" requirement of Section 7(a)(2). This approach, however, renders Section 7(a)(1) and the conservation obligation superfluous, a result that is not favored as a matter of statutory construction. See, *e.g.*, *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Chemehuevi Tribe* v. *FPC*, 420 U.S. 395, 402-403 (1975).

By contrast, the court of appeals' construction recognizes the comprehensive thrust of the Act and gives effect to all provisions of the Act. Under that construction, the "no jeopardy" requirement in Section 7(a)(2) establishes the nondiscretionary minimum obligation with which all federal agencies must comply. The distinct provision in Section 7(a)(1) for the Secretary to "review" other "programs administered by him" and to "utilize such programs in furtherance of the purposes of this chapter" is more flexible. It leaves to the sound discretion of the Secretary, after the review of a program in light of the Endangered Species Act, to determine the manner in which the statutory goal of conservation will be pursued in the context of the particular program. It does not, in our view, require the Secretary to ignore the other congressional purposes for which the program in question was adopted or to devote all resources made available for these other purposes to the single goal of species restoration. The matter is one of judgment, not absolutes.[8] There is no occasion here to consider the scope

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[8]For example, Section 2(c) declares it to be the policy of Congress that all federal agencies shall "seek" to conserve endangered and threatened species, and Sections 2(c) and 7(a)(1) both speak in terms of the utilization of agency programs "in furtherance" of the conservation purposes of the Act. This language does not suggest a requirement of slavish devotion to the immediate restoration of endangered species and abandonment of all else.

of that discretion. The courts below have sustained the manner in which the Secretary has exercised his discretion in implementing the Endangered Species Act in connection with Stampede Dam — by providing for releases of water to enhance the cui-ui and cutthroat trout — and petitioners do not contend that this discretion, if it exists, was abused. They simply argue that the Secretary had no such discretion.

Moreover, the court of appeals' holding that the Secretary is authorized by the Endangered Species Act to take affirmative measures to restore the cui-ui and cutthroat trout is strongly supported by this Court's decision in *TVA* v. *Hill, supra*. There, the Court stated that "[t]he plain intent of Congress in enacting this statute was to halt and *reverse* the trend toward species extinction, whatever the cost." 437 U.S. at 184 (emphasis added). The Court's understanding of the 1973 Act in this regard was buttressed by numerous references to the legislative history,[9] and it was confirmed by the legislative history of 1978 and 1979 amendments to the Act that were enacted after the decision

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[9]See 437 U.S. at 179 (emphasis added) (a witness at the hearings recommended that "Congress require all land-managing agencies 'to avoid damaging critical habitat for endangered species and *to take positive steps to improve such habitat*' "); *id.* at 180 (quoting the definition of "conserve" in Section 3(3) as including steps to bring the species to the point where the protections of the Act are no longer required); *id.* at 182-183, quoting H.R. Rep. 93-412, 93d Cong., 1st Sess. 14 (1973) (emphasis supplied by the Court) (Section 7 "*requires* the Secretary and the heads of all other Federal departments and agencies to use their authorities in order to carry out programs for the protection of endangered species"); *id.* at 187, quoting H.R. Rep. 93-412, *supra*, at 14 (emphasis added) (Section 7 authorizes the Director of the Park Service to protect grizzly bears in Yellowstone Park "until their members have *recovered* sufficiently to withstand those pressures").

in *TVA* v. *Hill*.[10] Petitioners' contention that the Endangered Species Act authorizes the Secretary to do no more in operating Stampede Dam than to refrain from jeopardizing the cui-ui and cutthroat trout thus is untenable.

c. Equally untenable is petitioners' extravagant assertion (Pet. 8) that by giving this interpretation to the Act, "[t]he Ninth Circuit in this case required the Secretary of the Interior to use all projects under his jurisdiction for the exclusive purpose of restoring the endangered and threatened species to their historical population levels." The court of appeals did nothing of the sort. Indeed, each phrase in petitioners' assertion is seriously flawed.

First, the court of appeals has not "required" the Secretary to do anything. It instead sustained the Secretary's own decision to conserve the fish and not to sell the Project's water for M & I purposes at this time (Pet. App. 8a). This case therefore presents no question of what obligations a court may impose on the Secretary to pursue the conservation purposes of the Act — over and above the minimum "no jeopardy" requirement — where he has chosen not to take affirmative measures to conserve an endangered or threatened species.[11]

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[10]See H.R. Rep. 95-1625, 95th Cong., 2d Sess. 10 (1978), paraphrasing *TVA* v. *Hill*, *supra* (the purpose of the Endangered Species Act is to "halt and reverse the trend toward species extinction — whatever the cost"); H.R. Rep. 95-1625, *supra*, at 5 (emphasis added) (the primary purpose of the Act is to prevent extinction "and to *return* the species to the point where they are viable components of their ecosystems"); H.R. Rep. 96-167, 96th Cong., 1st Sess. 3 (1979) (same).

[11]In the four appellate decisions cited by petitioners (Pet. 19 n.11), private plaintiffs challenged federal projects on the ground that the agency had not insured that the species would not be jeopardized and thus had not met even the minimum requirement under what is now Section 7(a)(2) of the Act. See *Roosevelt Campobello International Park Comm'n* v. *EPA*, 684 F.2d 1041, 1052 (1st Cir. 1982); *North Slope Borough* v. *Andrus*, 642 F.2d 589, 607 (D.C. Cir. 1980); *Sierra Club* v.

Second, the court of appeals did not address the manner in which the Secretary may implement the Endangered Species Act with regard to "all projects under his jurisdiction." The court addressed only the particular circumstances of Stampede Dam. It did not suggest, for example, that the Secretary may take water away from the Newlands Reclamation Project and use it instead to increase the water available for the fish in Pyramid Lake. Two Terms ago, this Court held in *Nevada* v. *United States, supra*, that the project landowners have vested rights in this water that are protected under the doctrine of res judicata by virtue of the *Orr Ditch* decree. There has been no claim by the Secretary, much less a holding by the court of appeals, that he is authorized by the Endangered Species Act to override those project water rights and to devote Newslands Project water to the restoration of endangered species. Accordingly, petitioners' assertion that the decision below would "compel the unilateral abrogation of existing repayment contracts and privately owned water rights" (see Pet. 14) is frivolous.

Insofar as Stampede Dam is concerned, however, petitioner Carson-Truckee Water Conservancy District and the water users it might serve -- unlike the landowners and irrigation districts on the Newlands Project and other reclamation projects — have no existing repayment contracts or vested rights to the water stored by Stampede Dam. Petitioners' discussion of other reclamation projects (see Pet. 14-17) therefore has no relevance to this case. There is no indication how many of these projects do or will

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Froehlke, 534 F.2d 1289, 1303-1304 (8th Cir. 1976); *National Wildlife Federation* v. *Coleman*, 529 F.2d 359 (5th Cir.), cert. denied, 429 U.S. 979 (1976). None of these cases involved Section 7(a)(1) or the other provisions at issue here that refer to the conservation purposes of the Act; none involved challenges to affirmative measures initiated by the agency to benefit endangered or threatened species; and none suggested that an agency has no such authority.

have an effect on an endangered species; whether the circumstances of any such project would make it reasonable for the Secretary to conclude that some or all project water should be used to restore an endangered species[12]; and whether, on any such project, there are existing repayment or water right contracts that might have a bearing on his doing so.[13]

Even more far-fetched is petitioners' assertion that under the court of appeals' decision, "the Secretary of Transportation will be required to utilize federal highway funding solely for the restoration of listed species" (Pet. 17) and the Secretary of Defense "would have to convert the primary mission of the Air Force from national defense to the restoration of whooping cranes" (Pet. 16 n.8). Neither the

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[12]The Narrows Unit Project, discussed by petitioners (Pet. 15-16), involves a situation in which the Secretary did not determine that all of the water from the project should be used to enhance the status of the particular endangered species, the whooping crane. As petitioners explain, the Fish and Wildlife Service there proposed reasonable and prudent alternatives to operate the project in a way that would not jeopardize the species. No such alternatives have been proposed here. Moreover, there is no indication that the whooping crane would significantly benefit, as do the fish in Pyramid Lake, from the total water resources of the project, such that it might be appropriate to devote more or all project water to "restoring" the crane. This example thus reinforces our submission that whether and to what extent a particular species can be "conserved" by utilizing a project administered by an agency — and the degree to which that project should be committed to that purpose — are matters within the discretion of the Secretary, at least in the first instance. Nothing in the court of appeals' opinion limits the Secretary's discretion in this regard by compelling that all water on all projects be devoted to species conservation.

[13]For similar reasons, there is no basis for petitioners' broad assertion (Pet. 14) that the decision of the court of appeals will "prevent finalization" of the 93 repayment contracts that were the subject of negotiations between the Bureau of Reclamation and water users during the July-September quarter. When and if Endangered Species Act problems arise, they must be resolved on a case-by-case basis. See 16 U.S.C. 1536(b) and (c). The court of appeals suggested no absolute rules.

Secretary of Transportation nor the Secretary of Defense has proposed such an outlandish undertaking, and no court would sustain it. Moreover, it is difficult to conceive, except in the most peculiar of circumstances, how the construction of highways or target bombing could be "utilized" affirmatively to restore endangered or threatened species. In the context of highway construction and defense maneuvers, the principal impact of the Endangered Species Act is to prevent the location of a road or military installation from jeopardizing a listed species. A dam, by contrast, obviously lends itself more readily to utilization to conserve an endangered species of fish.

Third, the court of appeals did not suggest that agencies generally are to devote projects that have other purposes to the "exclusive purpose" of restoring endangered and threatened species. Nor is that even the result of the Secretary's determination, sustained by the courts below, with regard to Stampede Dam. The Secretary of the Interior directed that construction of Stampede begin in 1966, without repayment contracts providing for the release of water for reimbursable beneficial uses, because he concluded that the project was justified at that time by its flood control benefits alone (Pet. App. 26a). The project of course continues to provide flood control, which is one of its express purposes under the Washoe Project Act. 43 U.S.C. (1970 ed.) 614. Indeed, "development of fish and wildlife resources" also is one of the express purposes of the Washoe Project. *Ibid.* As a result, the release of water in a manner that promotes the spawning of the cui-ui and Lahontan cutthroat trout in Pyramid Lake has the effect in this case of *furthering* a purpose of the Project itself, not of devoting the Project exclusively to a purpose that is wholly foreign to its authorizing statute, as petitioners argue.

Fourth, contrary to petitioners' repeated characterization (Pet. 8, 9, 18), the court of appeals' opinion says nothing about restoring species to their "historical population levels" (Pet. 8). The definition of the term "conserve," on which the court of appeals relied (Pet. App. 6a-8a), refers to methods and procedures necessary to bring the species "to the point at which the measures provided pursuant to this chapter are no longer necessary" (§ 3(3), 16 U.S.C. 1532(3)) — *i.e.*, the point at which they are no longer endangered or threatened. That presumably could be well below the "historical population levels" of the fish.

3. Petitioners' related argument (Pet. 10, 13, 20) that the Secretary is precluded from taking measures to enhance the fish in Pyramid Lake because to do so would conflict with the purposes of the Washoe Project Act also is without merit. As an initial matter, the fact that furthering the purposes of the Endangered Species Act (by restoring an endangered species) might require that the purposes of the particular project be displaced to some extent is not in itself an absolute barrier to an agency's taking such measures. Section 7(a)(1) directs the Secretary to "review" other programs administered by him, thereby making clear that the implementation of previously authorized projects was to be reassessed in light of the subsequent passage of the Endangered Species Act. Section 7(a)(1) then further directs the Secretary to "utilize such programs" to further the purposes of the Act. Thus, the effect of Section 7(a)(1) is to provide that the purposes of the Endangered Species Act of conserving listed species now are also additional purposes of the particular program involved — at least where this species enhancement goal is germane to the particular project, as it plainly is in the context of Stampede Dam. This Court stressed this very point in *TVA* v. *Hill*, *supra*, when it observed that "[t]he pointed omission of the type of qualifying language previously included in endangered species

legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." 437 U.S. at 185. See generally *id.* at 181-185.

Moreover, whatever the force of petitioners' "conflict" argument in other settings, it has no merit whatever in this case. As we already have explained, the "development of fish and wildlife resources" is one of the express purposes of the Washoe Project Act. 43 U.S.C. (1970 ed.) 614. By contrast, M & I consumption, which petitioners seek to promote, is not even mentioned in the Act. Moreover, the House Report on the Washoe Project Act states that "[r]estoration of the Pyramid Lake trout fishery to its full potential value is deemed to be of national interest and importance, because, among other things, of the adverse results of previous Federal participation in the development of the waters affecting the fishery of the lake." H.R. Rep. 2055, *supra*, at 5. Against this background, the release of water for restoration of the fishery in Pyramid Lake plainly does not conflict with the purposes of the Washoe Project Act.

To be sure, when the Washoe Project Act was passed, Congress focused on the fishery primarily by providing for facilities to increase minimum storage in Lake Tahoe and the Marble Bluff Dam and other facilities on the lower-Truckee. 43 U.S.C. (1970 ed.) 614c. But circumstances have changed since then. Significantly, for example, irrigation and drainage of thousands of acres were expected to be among the principal uses of project water; in fact, aside from generation of hydroelectric power (which of course will still take place), irrigation and drainage were the only reimbursable purposes to which the project was to be put. But as the court of appeals pointed out, that "is no longer a viable use of the project" (Pet. App. 4a). The question confronting the Secretary at the present time then, is what use should be made of water stored by Stampede Dam in

these changed circumstances. Especially in light of the intervening passage of the Endangered Species Act and the importance Congress placed on restoring the Pyramid Lake fishery when it passed the Washoe Project Act, it surely is not an abuse of discretion for the Secretary to release project water to develop the fish resource rather than to sell the water for M & I consumption at this time.

Petitioners seek to avoid this result by characterizing the primary purpose of the Washoe Project Act as obtaining reimbursement for the cost of its construction, and argue that the Secretary's release of water for the fishery instead of selling it for M & I use conflicts with that purpose. This argument is without merit. The "purposes" of the Washoe Project Act are expressly listed in 43 U.S.C. (1970 ed.) 614: irrigation, drainage, flood control, hydroelectric power, development of fish and wildlife resources, and other beneficial purposes. Obtaining reimbursement is not listed as a separate "purpose," much less the overriding one that petitioners maintain it is. Rather, reimbursement is the *consequence* of using project water to fulfill certain of the listed purposes, two of which (irrigation and drainage) are no longer viable. We do not mean to denigrate the importance to the Federal Treasury of obtaining reimbursement or to doubt the role of the reimbursement principle in the history of the reclamation program. But that feature of the reclamation program was intended principally for the benefit of the government, not to confer rights on private parties who might make the reimbursements, such as petitioner Carson-Truckee Water Conservancy District or the water users it might serve. Moreover, Congress anticipated that furthering the purposes of the Endangered Species Act would often entail substantial costs (see *TVA* v. *Hill*, 437 U.S. at 184) — here, in the form of reimbursements delayed or foregone. That consequence alone is not a basis for concluding

that the Secretary may not further those purposes in the operation of Stampede Dam.[14]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1985

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[14]Contrary to petitioners' contention (Pet. 20-24), the court of appeals did not hold that the Secretary has no obligation to seek reimbursement for the construction and operation costs of Stampede Dam. It expressly vacated the district court's judgment on that issue and reserved a ruling on it. See Pet. App. 4a-5a, 10a. In footnote 5 of its opinion (*id.* at 8a n.5), upon which petitioners apparently rely (Pet. 21 n.13), the court of appeals indicated only that the Secretary has no *present* obligation to sell water for M & I use that overrides his authority under the Endangered Species Act to release water for fishery conservation purposes. Petitioners' argument (Pet. 20-24) about the role of reimbursement in the reclamation program therefore has no relevance to this case. Nor does the Secretary have any intention of abandoning the reimbursement principle in his administration of the reclamation program generally or of Stampede Dam in particular.

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